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DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 4874-47

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NATIONAL MARITIME UNION OF AMERICA, ET AL.,
*Plaintiffs,*

*vs.*

PAUL M. HERZOG, ET AL.,
*Defendants*

---

Filed Apr. 26, 1948. Harry M. Hull, Clerk.

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## STATEMENT AS TO JURISDICTION

---

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the National Maritime Union of America, herein called the NMU, Joseph Curran, William Hill and Ray Sandberg, plaintiffs in the above entitled cause, submit herewith their statement showing the basis of the jurisdiction of the Supreme Court upon appeal to review the judgment of the District Court.

This is an action brought by plaintiffs in the District Court of the United States for the District of Columbia to enjoin the defendants, who are members of, and constitute, the National Labor Relations Board, from enforcing the provisions of Section 9(f), (g) and (h) of the

National Labor Relations Act, as amended, 29 U. S. C. Section 159(f), (g) and (h), 61 Stat. 143, and from conducting an election of representatives without placing the plaintiff National Maritime Union on the ballot, and to secure a declaratory judgment of the invalidity of these provisions of law on the ground that they are repugnant to the Constitution of the United States.

A statutory three-judge court was convened, pursuant to the provisions of Section 380(a) of Title 28 U. S. C. 50 Stat. 751. The statutory court on April 23, 1948, entered a judgment dismissing the complaint on the merits, holding that the provisions of the statute challenged were valid and not repugnant to the Constitution.

### A. Statutory Provision on Which Jurisdiction Rests

The statutory provision which confers jurisdiction upon the Supreme Court to review the judgment is Section 380(a) of Title 28 U. S. C. 50 Stat. 751 which reads as follows:

> "No interlocutory or permanent injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any Act of Congress upon the ground that such Act or any part thereof is repugnant to the Constitution of the United States shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a circuit judge. When any such application is presented to a judge, he shall immediately request the senior circuit judge (or in his absence, the presiding circuit judge) of the circuit in which such district court is located to designate two other judges to participate in the hearing and determining such application. It shall be the duty of the senior circuit judge or the presiding circuit judge, as the case may be, to designate

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immediately two other judges from such circuit for such purpose, and it shall be the duty of the judges so designated to participate in such hearing and determination. Such application shall not be heard or determined before at least five days' notice of the hearing has been given to the Attorney General and to such other persons as may be defendants in the suit: Provided, That if of opinion that irreparable loss or damage would result to the petitioner unless a temporary restraining order is granted, the judge to whom the application is made may grant such temporary restraining order at any time before the hearing and determination of the application, but such temporary restraining order shall remain in force only until such hearing and determination upon notice as aforesaid, and such temporary restraining order shall contain a specific finding, based upon evidence submitted to the court making the order and identified by reference thereto, that such irreparable loss or damage would result to the petitioner and specifying the nature of the loss or damage. The said court may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension, in whole or in part, until decision upon the application. The hearing upon any such application for an interlocutory or permanent injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day. An appeal may be taken directly to the Supreme Court of the United States upon application therefor or notice thereof within thirty days after the entry of the order, decree, or judgment granting or denying, after notice and hearing, an interlocutory or permanent injunction in such case. In the event that an appeal is taken under this section, the record shall be made up and the case docketed in the Supreme Court of the United States within sixty days from the time such appeal is allowed, under such rules as may be prescribed by the proper courts. Appeals under this section shall be heard by the Supreme Court of the United States at the

earliest possible time and shall take precedence over all other matters not of a like character. This section shall not be construed to be in derogation of any right of direct appeal to the Supreme Court of the United States under existing provisions of the law."

**B. The Statute of the United States Involved in the Action**

The validity of Section 9(f), (g) and (h) of the National Labor Relations Act, as amended, 29 U. S. C. 159 (f), (g) and (h), 61 Stat. 143, are challenged in this action on the ground that they are repugnant to the Constitution of the United States. These provisions read as follows:

> 9(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—
>
> (1) The name of such labor organization and the address of its principal place of business;
>
> (2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded $5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;
>
> (3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

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(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and by-laws showing the procedure followed with respect to (a) qualification for or restrictions on membership. (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

9(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsec-

tion (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under Section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

9(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

### C. Date of Judgment and Petition for Appeal

The date of the final judgment of the District Court here sought to be reviewed is April 23, 1948.

The petition for allowance of appeal was presented on April 26, 1948.

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**D. Substantial Nature of the Question Presented**

This is an action instituted by the NMU, an unincorporated labor organization, Joseph Curran, president of that labor organization, and William Hill and Ray Sandberg, members of the labor organization. The suit was brought to secure declaration of the invalidity of and an injunction against the enforcement of Section 9(f) (g) and (h) of the National Labor Relations Act, as amended, on the ground that these provisions are repugnant to the Constitution in that they constitute an impairment of the right of free speech and free assembly and are an infringement upon the right of the plaintiffs and of the other officers and members of the plaintiff labor organization to associate and join together for their common and lawful objectives and aims, and deprive the plaintiffs of liberty without due process of law, all in violation of the First, Fifth, Ninth and Tenth Amendments.

Section 9(h) was further attacked on the ground that it was vague, indefinite and uncertain in violation of the Fifth Amendment, and that it constituted a bill of attainder in violation of Article I, Section 9.

This action involves the first attack against the validity of the requirement of the Taft-Hartley Act that labor organizations file financial reports and the so-called "non-Communist affidavit," in order to be eligible to participate in proceedings before the National Labor Relations Board. A decision by the Supreme Court on the validity of these provisions is being awaited by a substantial number of labor organizations, both national and local, to guide them as to whether or not they may be constitutionally required to comply with these provisions. Only a decision by the Supreme Court can put at rest the doubts and uncertainties which now prevail throughout the labor movement, and have caused numerous instances of industrial unrest.

The present case stems from a petition for certification of representatives filed by a rival labor organization. The NMU filed a petition for intervention in the proceeding. The National Labor Relations Board dismissed this intervention on the ground that the NMU had not complied with the provisions of Section 9(f), (g), and (h) and ordered that an election be held with only the rival labor organization on the ballot.

The questions presented include the following:

(1) Whether the provisions of Section 9(f), (g), and (h), which deny to the members of the NMU the right of association and their right to join together for their common welfare, except on meeting certain conditions, deprive the members of the NMU of freedom of speech and assembly and of liberty without due process of law, in violation of the First, Fifth, Ninth and Tenth Amendments.

(2) Whether Section 9(h) by denying to union members the right to elect officers of their own choosing, when such officers hold certain legal political beliefs, and conditioning the exercise of a federal privilege upon the abandonment of legal political beliefs, is an abridgement of freedom of speech and assembly in violation of the First Amendment.

(3) Whether section 9(h) constitutes a bill of attainder in violation of Article I, Section 9 of the Constitution.

(4) Whether Section 9(h) is repugnant to the Constitution in that it is vague and indefinite in conflict with the requirements of the Fifth Amendment.

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1. *Section 9(f), (g), and (h) deny to the members of the NMU their right of association and their right to join together for their common welfare except on meeting certain conditions, and thus deprive the members of the NMU of freedom of speech and assembly and of liberty without due process of law, in violation of the First, Fifth, Ninth a l Tenth Amendments.*

The concerted activities of members of labor organizations are basic rights. They constitute an exercise of the constitutional rights of free speech, assembly and association. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Thomas* v. *Collins*, 323 U. S. 516; *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33, 34; *Texas & N. O. R. Co.* v. *Brotherhood of Ry. and S. S. Clerks*, 381 U. S. 548, 570; *Virginia Ry.* v. *System Federation*, 300 U. S. 515, 543, 544; *Jacobs* v. *Cohen*, 183 N. Y. 207, 212.

The allegations of the complaint and the uncontroverted statements in the affidavits, which must be considered as true on the government's motion to dismiss, indicate the manner in which these rights are exercised in the plaintiff labor organization. By denying to the NMU the right to participate in election proceedings, while affording these rights to rival labor organizations, these rights are basically impaired. If a rival labor organization is certified as a result of a proceeding in which the NMU is denied the right to participate, the NMU is by this same statute denied the right to strike (Section 303(3), 29 U. S. C. § 187(a)(3); Section 8(b)(4)(C), 29 U. S. C. § 158(b)(4)(C)); or to obtain the assistance of other labor organizations (Section 303(2), 29 U. S. C. § 187(a)(2); Section 8(b)(4)(B), 29 U. S. C. § 158(b)(4)(B)). The majority opinion erroneously stated that the plaintiffs urged the "privilege of exclusive bargaining agency to be a basic, constitutional right." This is incorrect. The contention made is that the

right to organize and function as a trade union is a basic constitutional right, and that the statutory scheme in establishing a rival labor organization as the exclusive bargaining agency while denying the plaintiffs the opportunity to qualify as such agency, with the attendant legal consequences, results in a denial of the basic, constitutional right to function and operate as a trade union.

The placing of the conditions contained in Section 9(f), (g), and (h) upon the exercise of these basic rights constitute a burden upon their exercise. Congress cannot forbid the enjoyment of a constitutional right nor can it burden or impair such right by resort to use of the commerce power. *Linder* v. *United States*, 265 U. S. 5; *Bailey* v. *Drexel Furniture Co.*, 259 U. S. 20; *Hammer* v. *Dagenhart*, 247 U. S. 251.

Nor may it impose as a sanction for compliance with these conditions a result which serves virtually to destroy the organization and deny its basic rights. *Steele* v. *Louisville & N. Ry Co.*, 323 U. S. 192; *Railway Mail Assn.* v. *Corsi*, 326 U. S. 88; *Near* v. *Minnesota*, 283 U. S. 697; *Hill* v. *Florida*, 325 U. S. 538, 543; *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 287, 288.

2. *Section 9(h), by denying to union members the right to elect officers of their own choosing when such officers hold certain legal political beliefs, and by conditioning the exercise of a Federal privilege upon the abandonment of legal political beliefs, abridges the freedom of speech and assembly, in violation of the First Amendment.*

The right to be free from restrictions upon the exercise of the freedom of speech or the holding of political beliefs is the most significant right guaranteed by our Constitution and is protected by the First Amendment. *DeJonge* v. *Oregon*, 299 U. S. 253; *Herndon* v. *Lowry*, 301 U. S. 242; *West Va. Bd. of Educ.* v. *Barnette*, 319 U. S. 625; *Thornhill*

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v. *Alabama*, 310 U. S. 88. As stated by Justice Prettyman in his dissent below:

> Freedom of political thought was the prime objective for which those particular clauses of the Amendment [First] were fashioned. . . .

The government and the majority of the court, below, both conceded that the Communist Party was a legal political party, and that neither membership in nor affiliation with that political party was illegal. Nevertheless, the statute denies to members of the union the unrestricted right to choose as officers members or affiliates of that political party. Limitations upon the selection of officers on the ground of legal political beliefs are obviously "limitations upon the speech and assembly of the members" (Justice Prettyman, dissenting below).

Section 9(h) declares that in the event an officer of a labor organization is a member of or affiliated with the Communist Party, that labor organization shall be penalized and denied the right to participate in Labor Board proceedings. The section thus conditions the exercise of certain rights upon the repudiation of a certain lawful political belief. It thus denies rights to persons holding certain lawful political beliefs and discriminates against them in favor of others who do not hold such political beliefs.

By Section 9(h), Congress further states to individuals who are barred from access to the Labor Board because of their adherence to certain lawful political beliefs or affiliations, that they may gain access if they sever their connection with the Communist Party and abandon these lawful political beliefs. Clearly, Congress cannot require the repudiation of any lawful political activity or belief as a condition to the exercise of a Federal privilege, or under pain of any sanction if the lawful activity or belief is not repudiated.

*3. Section 9(h) constitutes a bill of attainder in violation of Article I, Section 9 of the Constitution.*

Section 9(h) denies rights to members or affiliates of a named legal political party. By setting that political party by name in the legislation under attack, Congress made irrelevant the activities or beliefs of that party or of its members. The majority opinion supports this provision, by arguing that Congress made certain findings with respect to that particular party. But it is the function of Congress to legislate. It cannot legislate the conclusion that an individual or a political party holds certain tenets or promotes certain doctrines. This is a factual question which can be determined only by an exercise of the judicial function. For Congress to take over this function, constitutes a bill of attainder in violation of Article I, Section 9. *United States* v. *Lovett*, 328 U. S. 303. Nor can Congress deny the exercise of rights or privileges unless an individual first takes an expurgatory oath denying his participation in or affiliation with lawful political activities. Cf. *Ex parte Garland*, 4 Wall. 333; *Cummings* v. *Missouri*, 4 Wall. 277.

*4. Section 9(h) is repugnant to the Constitution since it is vague and indefinite in conflict with the requirements of the Fifth Amendment.*

Legislation must conform to the requirements of precision and freedom from ambiguity that have been established as basic to our concept of due process of law. *Small Co.* v. *American Sugar Ref. Co.*, 267 U. S. 233; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Herndon* v. *Lowry*, 301 U. S. 242.

Section 9(h) does not meet these requirements since it does not furnish an ascertainable standard of conduct; its language is not sufficiently clear and unambiguous. The

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provision employs such terms as "affiliated," "believe in," "teaches," and "supports." None of these terms is susceptible of exact definition, none of them furnishes a clear standard of meaning as to the conduct which Congress is regulating, or condemning. No definition is provided in the act, no interpretation is available either from context or usage. Yet a failure to understand these vague terms may subject one to a criminal penalty under Tit. 18 U. S. C. Section 80 and this in a prosecution where the unconstitutional ambiguity could not be raised as a defense. *Kay* v. *United States,* 303 U. S. 1, 6; *United States* v. *Barra,* 149 F. 2d 489 (C. C. A. 2).

**Opinion of the Court**

Copy of the opinion of Justice Wilbur K. Miller on behalf of the statutory court and the dissenting opinion of Justice E. Barrett Prettyman filed April 13, 1948 is affixed hereto as Exhibit "A".

**Conclusion**

It is thus clear that this appeal is within the exclusive jurisdiction of the Supreme Court and that substantial questions of widespread importance are involved, requiring the review of the judgment of the statutory court on a full hearing on the merits.

Respectfully submitted,

WILLIAM L. STANDARD,
DAVID REIN,
*Attorneys for Plaintiffs.*

April 26, 1948.

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1947**

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# No. 808

---

NATIONAL MARITIME UNION OF AMERICA, ET AL.,
*Appellants,*

*vs.*

PAUL M. HERZOG, ET AL.,
*Appellees*

---

## MOTION FOR INJUNCTION PENDING APPEAL

---

Now come the appellants by their counsel and move the Court to grant an injunction restraining the appellees and each of them, and their officers, agents, servants, employees, and attorneys, and all persons in active concert or participation with them, from, pending a decision on appellants' appeal to this Court from the order of the District Court of the United States for the District of Columbia heretofore entered dismissing the complaint, holding any further elections to determine the collective bargaining representative of the employees of M. A. Hanna Co. (NLRB Case No. 8R-2611) without having the National Maritime Union on the ballot, or from in any other manner or by any proceeding or order determining or attempting to determine that any labor organization other than the National Maritime Union is the representative of the employees of said com-

pany for collective bargaining or that no labor organization is such a representative.

Appellants pray further that the Court fix such terms as to bond as it considers proper for the security of the rights of the appellees.

In support of this motion, appellants refer to the following documents:

(1) The opinion of the Court below dismissing the complaint together with dissenting opinion of Justice Prettyman.

(2) Motion for injunction pending appeal presented to the Court below.

(3) The order denying injunction pending appeal with attached memorandum of Justice Prettyman.

It appears therefrom that the cause herein may become moot and that an appropriate order is necessary to preserve the *status quo* and the effectiveness of the judgment subsequently to be entered.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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# No. 808

---

NATIONAL MARITIME UNION OF AMERICA, ET AL.,
*Appellants,*

*vs.*

PAUL M. HERZOG, ET AL.

---

## REPLY TO STATEMENT OF MATTER MAKING AGAINST JURISDICTION OF THIS COURT

---

WILLIAM L. STANDARD,
DAVID REIN,
*Counsel for Appellants.*

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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# No. 808

---

NATIONAL MARITIME UNION OF AMERICA, ET AL.,
*Appellants,*

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PAUL M. HERZOG, ET AL.

---

## REPLY TO STATEMENT OF MATTER MAKING AGAINST JURISDICTION OF THIS COURT

---

(1) Appellees concede that the questions relating to the constitutionality of Section 9(h) of the Act are substantial in character and present issues of great public importance in the administration of the Act.

(2) Appellees argue that the questions relating to the constitutionality of Section 9(f) and (g) are not substantial in character. The reason advanced to support this position; *i.e.*, that all that is involved is application of the majority rule principle is frivolous. The principle of majority rule as set forth in *Virginian Ry.* v. *System Federation No. 40*, 300 U. S. 515, 560, is in no way relevant. It is one thing to be deprived of bargaining status and an opportunity to function as a union because a majority of em-

ployees vote for one union or no union in preference to the contending union. It is another to be deprived of such status and opportunity as a result of a vote in which the contending union was not allowed to be on the ballot. "Majority rule" decides which of the alternatives voted on shall be binding. Obviously, it does not apply to an alternative not before the electorate and hence not voted on. The fact that the majority chooses course A as between a vote limited to courses A, B and C, carries no implication that the majority voted to foreclose course D.

The appellees contend and have always contended (see Statement of Jurisdiction pp. 8-9) that their constitutional rights are being denied by a statutory scheme which deprives the appellant trade union of its opportunity to function and in so doing abridges the right of its members to free speech and assembly. Thus the position of the appellants is quite distinct from that of a trade union, which, although participating in a ballot, fails to win a majority. The question of the employment of sanctions which operate to deny the right of a trade union to function is a substantial one, see *Alabama State Federation of Labor* v. *McAdory*, 325 U. S. 450, 459, and was certainly so regarded by all three members of the court below, as may be seen from their treatment of the subject.

(3)(a) The appellees contend that if 9(f) and (g) are held to be constitutional, appellants are not entitled to a review of the constitutionality of Section 9(h). This contention is a novel one and itself raises a question substantial in character. The substantial nature of the question appears clearly from the fact that the court below unanimously rejected this contention of the appellees. Although the court upheld 9(f) and (g), as constitutional, it nevertheless considered that it was required to pass upon the challenge to the constitutionality of 9(h). All three sections

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raise discrete constitutional issues. Certainly there is no reason why consideration of the constitutionality of 9(f) and (g) should require prior or more favored treatment than the constitutionality of Section 9(h). In any event, the question here posed by the appellees is substantial in character.

(b) A substantial question is raised as to the interpretation of the Declaratory Judgment Act, 28 U. S. C. § 400. The appellants challenge the constitutionality of three sections of the Act. Can the appellants be denied the right to a review of one section of the Act upon a holding that other sections are constitutional? This question has never before been passed upon by this Court.

(c) A court of equity has jurisdiction to grant relief upon conditions. *S. E. C.* v. *U. S. Realty & Improvement Co.*, 310 U. S. 434, 445. *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515, 552; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165, 177. Because of the concededly important public question raised in the challenge to constitutionality of Section 9(h), *Virginian Ry. Co.* v. *System Federation No. 40, supra*, the public interest may require this Court, if it determines that 9(f) and (g) are constitutional, to exercise its equity powers so as to grant conditional relief. This question is in itself a substantial one.

(4) The Court below passed upon a question conceded by all to be substantial in character; *i.e.*, the constitutionality of section 9(h) of the Act. This in itself is sufficient to establish the jurisdiction of the Court below and the jurisdiction of this Court on appeal, even if no other substantial question was raised or passed upon. *California Water Service Co.* v. *City of Redding*, 304 U. S. 252, 255-256. The suggestion of the appellees can lead only to an anomalous result. If this Court refuses to note jurisdiction on the

basis advanced by appellees, it will in effect affirm without consideration a holding reached below on an entirely different question, one which the appellees admit to be substantial and which they concede requires consideration by this Court.

WILLIAM L. STANDARD,
DAVID REIN,
*Attorneys for Appellants.*

# In the Supreme Court of the United States

OCTOBER TERM, 1947

---

No. 808

NATIONAL MARITIME UNION OF AMERICA, ET AL., APPELLANTS

*v.*

PAUL M. HERZOG, ET AL.

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**STATEMENT OF MATTER MAKING AGAINST JURISDICTION OF THIS COURT, PURSUANT TO RULE 12, PARAGRAPH 3**

Section 9(f) of the National Labor Relations Act, as amended by the Labor Management Relations Act (61 Stat. 136) provides that the National Labor Relations Board shall make no investigation of questions raised by a labor organization unless that organization has filed copies of its constitution and by-laws and a report containing specified information and that it has also filed financial statements with the Secretary of Labor and furnished copies thereof to members of the organization. Section 9(g) provides that in order to be eligible for certification a labor organization must file such reports annually with the Secretary of Labor. Section 9(h) provides that the Board shall not make any investigation of any question concerning the representation of employees raised by a labor organization unless the officers of that organization

have filed affidavits that they are not members of the Communist Party or affiliated with it, and that they do not believe in, are not members of, or do not support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

The appellant, National Maritime Union, has filed none of the above documents. The National Labor Relations Board accordingly has denied it the right to intervene in a representation proceeding and to appear on the ballot in such a proceeding. The Union thereupon brought this suit for a declaratory judgment and an injunction, alleging that paragraphs (f), (g), (h) of Section 9 are unconstitutional.

The Board agrees with the appellant that the questions relating to the constitutionality of Section 9(h), the affidavit provision, are substantial in character and present issues of great public importance in the administration of the Act. The Board believes it to be in the public interest that there be an early final determination of the constitutionality of this paragraph. The Board doubts, however, that this Court will ever reach the constitutionality of Section 9(h) in the instant case, and is of the view that the case presents no other substantial constitutional question.

This case comes to this Court by direct appeal under Section 3 of the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. sec. 380a. This Court has held on several occasions that this Section, like Section 266 of the Judicial Code, does not apply "unless the questions raised as to the constitutional validity of an Act of Congress are substantial." *Jameson & Co.* v. *Morgenthau,* 307 U. S. 171, 172; *Cali-*

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*fornia Water Service Co.* v. *City of Redding,* 304 U. S. 252, 254-255. It is our belief that appellants' contentions as to the unconstitutionality of Paragraphs (f) and (g) of Section 9 are devoid of substance, and that, if this is so, appellants' failure to file the documents required by those paragraphs would preclude the National Maritime Union from being allowed to participate in the Board's election irrespective of the validity of Paragraph (h). This means that if Paragraphs (f) and (g) are held constitutional appellants would not be entitled to participate in the representation proceeding and that there would be no occasion for this Court to pass upon the substantial issues of constitutionality presented by Paragraph (h).

Appellants have not contended that Congress lacks the constitutional power to impose the requirements as to statements and financial reports contained in Paragraphs (f) and (g) (see opinion below, p. 12). It is not suggested that the substantive requirements are unrelated to the objectives of the legislation or are unreasonable or unduly burdensome or that they exceed the powers conferred upon Congress by the Commerce Clause. Any such contentions with respect to the validity of informational requirements would be foreclosed by controlling decisions of this Court. *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 469; *Electric Bond & Share Company* v. *Securities and Exchange Commission,* 303 U. S. 419; *Weeks* v. *United States,* 245 U. S. 618.

Appellants' sole contention as to these paragraphs is that Congress may not constitutionally require compliance with these admittedly valid requirements as a condition to permitting labor

organizations to utilize the facilities of the Board. Clearly appellants do not have any constitutional right to act as an exclusive statutory bargaining agency, for that right is derived from the National Labor Relations Act itself and Congress obviously was under no constitutional obligation to enact that statute. Indeed we do not understand appellants to claim any such right (appellants' statement, pp. 8-9). Their contention seems to be that the right to organize and function as a trade union is a basic constitutional right which Congress cannot impair by establishing a rival labor organization as the exclusive bargaining agency while denying appellants the opportunity to qualify as such agency. But appellants will not be deprived of any such right unless a majority of the employees in the bargaining unit favor another representative. If, as occurred in connection with one of the two employers involved in this case, a majority do not select another representative, a disqualified labor organization stands in no worse position than if the statute had not been passed. Certainly, if the majority of the employees select a different bargaining representative the minority union cannot assert that it has been deprived of a constitutional right. This is implicit in the doctrine of majority rule held to be constitutional in *Virginian Ry.* v. *System Federation,* 300 U. S. 515, and *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. The disadvantage to a labor organization which does not comply with Paragraphs (f) and (g) which results from its inability to participate in the Board's representation proceeding and to be certified by the Board is not of constitutional stature. It is a detriment which flows from the organization's voluntary refusal to com-

ply with the requirements which Congress has the power to impose.

Furthermore, if Congress has the right to require labor organizations to file the specified information, it has the power to establish sanctions designed to insure compliance with the substantive requirements. The conditioning of a labor organization's right to avail itself of the advantages provided by the statute upon compliance with the informational paragraphs clearly would seem to be a permissible type of sanction. Compare *Lewis Publishing Co.* v. *Morgan, supra,* which sustains the conditioning of the second-class mailing privilege upon the furnishing of information not greatly unlike that contemplated by Section 9(f). *Hill* v. *Florida,* 325 U. S. 538, cited by appellants, held that the sanctions imposed by the Florida statute were unlawful because of their conflict with the National Labor Relations Act. This decision obviously does not mean that an amendment to the Federal statute attaching conditions to privileges of its own creation would be unconstitutional.

For the above reasons we submit that appellants' contentions as to the invalidity of Paragraphs (f) and (g) raise no substantial constitutional questions. If the Court is of the same opinion, there will be no need to consider the validity of Paragraph (h) in order to dispose of the case. For Sections 9(f) and (g) themselves require exclusion from election ballots of organizations which fail to file the material contemplated by those sections. Since appellants have admittedly not complied with these requirements, the Board's action in denying N. M. U. a place on the ballot was proper, entirely apart from any possible question concerning the validity of Section 9(h) with which appellants like-

wise failed to comply. Determination of the questions which appellants seek to raise concerning the constitutionality of Section 9(h) is thus not essential to disposition of the controversy, since, whether that provision be ultimately sustained or set aside, appellants are entitled to no relief in this proceeding. Their prayer for a declaration of unconstitutionality raises only an abstract issue to the extent that it has no effect upon the representation proceedings. It is doubtful, therefore, whether this Court will desire to consider important questions concerning the constitutionality of Section 9(h) on this appeal.

We urge, therefore, that if this Court regards the questions presented as to the constitutionality of Paragraphs (f) and (g) as lacking in substance it would be appropriate for the Court to order the appeal dismissed for lack of jurisdiction.

Respectfully submitted,

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MAY 1948.

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No. 808. NATIONAL MARITIME UNION OF AMERICA ET AL. *v.* HERZOG ET AL. Appeal from the District Court of the United States for the District of Columbia. *Per Curiam:* The decision of the statutory three-judge court is affirmed to the extent that it passes upon the validity of § 9 (f) and § 9 (g) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 143; 29 U. S. C. §§ 141, 159 (f) 159 (g), Supp. 1947). We do not find it necessary to

reach or consider the validity of § 9 (h). MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted and the case set down for argument. *William L. Standard* and *David Rein* for appellants. *Solicitor General Perlman* for appellees. Reported below: 78 F. Supp. 146.